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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA - FRESNO DIVISION

In re:

FRANK MIRANDA DORES and
 MARY ANNE SOUZA DORES.

Debtor(s).

Case No. 16-10169-B-13

Chapter 13

D.C. No. FW-1

Date: February 11, 2016

Time: 1:30 p.m.

Place: Dept. B, Ctrm. 12, 5th Floor

United States Courthouse

2500 Tulare St., Fresno, California

Judge: Hon. René Lastreto

**MOTION FOR AN ORDER OF CONTEMPT FOR VIOLATION OF THE
 AUTOMATIC STAY**

The Debtor hereby moves for an order of contempt for violation of the automatic stay by Bunnett & Co., Inc. and Energy Feeds International, LLC (collectively, “Bunnett”) as described herein (the “Motion”) pursuant to 11 U.S.C. § 362, 11 U.S.C. § 105, F.R.B.P. 9020, and the Rules of this court. This Motion is based on the Notice of Motion and the Declaration of Frank Dorez filed herewith, and on the contents of Debtor’s Schedules and Statement of Affairs and the following points and authorities:

INTRODUCTION

Bunnet is a multi-million dollar company that supplies mineral supplements for use in the dairy industry. Debtor Frank Does (“Debtor”) worked for Bunnett from approximately 2008 until October 2015. Due to stress caused by workplace harassment and cutthroat business practices, Debtor resigned from his employment with Bunnett in approximately October 2015.

In approximately November 2015, continuing its pattern of harassment and cutthroat business practices, Bunnett filed an action in Texas against Debtor Frank Dores (“Debtor”) for breach of fiduciary duty and misappropriation of trade secrets, seeking damages in an amount to be determined at trial (the “Bunnett Lawsuit”). During his employment by Bunnett, Debtor had always worked in California, and was financially unable to defend himself in Texas. On the other hand, Bunnett has substantial resources with which to bring harassing litigation matters against Debtor. Debtor did not misappropriate trade secrets or breach any fiduciary duties and if he had the resources to do so, could have defended himself on the merits. But after running up over \$50,000 in attorney fees which he could not pay, Debtor had to file this bankruptcy case.

After being informed of the bankruptcy case, instead of ceasing litigation, as is required by the automatic stay, Bunnett filed a motion to compel (the “Post-Filing Motion”) discovery from Debtor arguing that the stay should not apply and asking the Texas court to grant monetary sanctions against Debtor.

The Bunnett Lawsuit includes a claim for pre-petition damages. Because the action contains an action for damages, the automatic stay of 11 U.S.C. § 362 clearly prohibits further litigation of the claims alleged therein. Consequently, filing the Motion to Compel was a violation of the automatic stay. This violation was especially egregious because the Motion to

1 Compel sought monetary sanctions against Debtor, an additional violation of the automatic
2 stay.

3
4 **FACTS**

5 Frank Does (“Debtor”) grew up in the dairy business. One of his first jobs was feeding
6 cows. After high school, he started working for a mineral supplement company delivering
7 minerals to dairy farmers, and eventually worked his way up to being a salesman for those
8 supplements. He did well and developed a good reputation in the industry, forging many
9 valuable relationships. Because of his reputation and relationships in the industry, in 2008 he
10 was hired by Bunnett to be a sales representative for California and several other western
11 states.

12 In October 2015, Debtor had to resign from Bunnett due to stress caused by workplace
13 harassment and cutthroat business practices. Shortly after resigning, Bunnett sued Debtor in
14 Texas with spurious accusations of breaching fiduciary duties and misappropriating trade
15 secrets (the “Bunnett Litigation”). The kind of aggressive and vindictive actions that Bunnett
16 has taken against Debtor in pursuing the Bunnett Litigation is an example of what they have
17 done to suppliers with whom Debtor had formed good relationships over many years.

18 Debtor attempted to defend himself from the spurious accusations by Bunnett and to
19 keep from having to litigate in Texas, but after approximately two months and over \$60,000 in
20 attorney fees, Debtor knew that he did not have the financial means to fight Bunnett. Due to
21 the Bunnett Litigation and other debts accumulated by Debtor, he and his wife were forced to
22 file this bankruptcy case. Debtor has been unable to work and has been on disability since
23 October 2015, and will remain on disability until at least May 2016. Even though Debtor
24

1 should be allowed to seek other employment in the dairy industry, he is not doing so now due
2 to his mental health and does not intend doing so before May 2016.

3 Debtor's deposition had been scheduled for January 26, 2016. This bankruptcy case
4 was filed on January 22, 2016. After learning of the filing of the bankruptcy case, on January
5 25, 2016, Bunnett filed a motion to compel (the "Post-Filing Motion") Debtor to appear for a
6 deposition in the Bunnett Litigation, specifically requesting that the Texas court order Debtor
7 to pay Bunnett's fees and costs in bringing the Post-Filing Motion.

8
9 **POINTS AND AUTHORITIES**

10 1. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, and it
11 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). A motion for civil contempt is an
12 appropriate procedural mechanism for enforcing the automatic stay. *See* F.R.B.P. 9020; In re
13 Hackard & Holt, 2014 WL 4966563 * 7 (Bankr. E.D. Cal. Oct. 3, 2014).

14 2. This bankruptcy matter was filed by the debtors on January 22, 2016, thus
15 instituting the automatic stay provisions of 11 U.S.C. § 362 (the "Automatic Stay"). The
16 Automatic Stay prohibits, *inter alia*, the "the commencement or continuation, including the
17 issuance or employment of process, of a judicial, administrative, or other action or proceeding
18 against the debtor that was or could have been commenced before the commencement of the
19 case under this title, or to recover a claim against the debtor that arose before the
20 commencement of the case under this title." 11 U.S.C. § 362(a)(1).

21 3. Prior to the filing of this bankruptcy, Bunnett filed the Bunnett Lawsuit against
22 Debtor, alleging various torts against Debtor. The Bunnett Lawsuit requests judgment in the
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24

1 form of injunctive relief and damages, including exemplary damages, reasonable attorneys
2 fees, costs of suit, and interest.

3 4. The Bunnett Lawsuit was and is based on allegations of pre-petition conduct of
4 the Debtor.

5 **The Automatic Stay Enjoins Further Discovery in the Bunnett Lawsuit**

6 5. The Automatic Stay is “is designed to immediately maintain the status quo by
7 precluding and nullifying postpetition actions, whether judicial or nonjudicial, in
8 nonbankruptcy forums against the debtor and property of the estate.” In re Dunbar, 235 B.R.
9 465, 470 (B.A.P. 9th Cir. 1999) aff’d, 245 F.3d 1058 (9th Cir. 2001).

10 6. It is important to remember that in the Ninth Circuit, creditors have an
11 affirmative duty to discontinue litigation on a pre-petition claim against a debtor in bankruptcy.
12 Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002).

13 7. Bunnett’s Post-Filing Motion appears to argue that the Bunnett Lawsuit is *not*
14 stayed, as an action to enjoin alleged ongoing tortious actions by the Debtor. Such an
15 argument ignores the fact that the purpose of the Bunnett Lawsuit is to obtain monetary
16 damages against the Debtor. Simply adding an injunctive claim to a lawsuit for damages does
17 not somehow eliminate a lawsuit from the restrictions of the Automatic Stay.

18 8. Additionally, discovery is “continuation” of a proceeding pursuant to the
19 provisions of § 362(a)(1). In re Manown, 213 B.R. 411, 412 (Bankr. N.D. Ga. 1997).

20 9. In spite of this, the Post-Filing Motion is a demand that Debtor continue to
21 engage in a discovery process that seeks to prove he should pay damages.

22 10. These demands run directly counter to the goals of the automatic stay as stated
23 by the Ninth Circuit:
24

1 The automatic stay gives the bankruptcy court an opportunity to
2 harmonize the interests of both debtor and creditors while preserving the
3 debtor's assets for repayment and reorganization of his or her obligations.
4 By halting all collection efforts, the stay affords the debtor time to propose
5 a reorganization plan, or simply to be relieved of the financial pressures
6 that drove him into bankruptcy.

7 In re Gruntz, 202 F.3d 1074, 1081 (9th Cir. 2000) (internal citations and quotes omitted).

8 11. Based on the foregoing, Debtor brings this motion to enforce the Automatic
9 Stay to which Debtor is entitled.

10 **There is No Exception to the Automatic Stay that Would Allow Bunnett to Proceed with**
11 **the Bunnett Lawsuit or the Post-Filing Motion**

12 12. While there are exceptions to the automatic stay, such exemptions should be
13 read narrowly. Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 590 (9th Cir.
14 1993).

15 13. In support of the assertion that the Bunnett Lawsuit is not stayed, Bunnett relies
16 on the Sixth Circuit case of Dominic's Rest. Of Dayton, Inc. v. Mantia, 683 F.3d 757 (6th Cir.
17 2012). In Dominic's, the court explicitly stated that the plaintiffs in that case were "neither
18 creditors nor claimants to [the debtors'] property." Id. at 760. In this bankruptcy case, Bunnett
19 has expressly sought damages as part of its lawsuit against Debtor, and is therefore, a creditor.
20 The Sixth Circuit further based its decision the based its decision on the fact that the district
21 court was ordering enforcement of its own pre-petition orders through a contempt order. Id. at
22 761. No such argument can be made in this case. Instead, the Post-Filing Motion seeks a post-
23 filing order compelling the Debtor to participate in discovery.

24 14. Specifically, the Post-Filing Motion requests as follows:

[Bunnett] respectfully request[s] that [the district court] (a) hold that the
automatic stay arising from Defendant's bankruptcy case is not applicable
to the preliminary injunction hearing and any discovery related thereto and
(b) order Defendant to appear at his deposition not later than Friday,
January 29, 2016, and (c) order Defendant to supplement his interrogatory

1 answers and document production to provide complete responses not later
2 than 48 hours prior to his deposition.

3 Request for Judicial Notice in Support of Motion for an Order of Contempt for Violation of the
4 Automatic Stay (“RJN”), Exhibit B (the Post-Filing Motion), p. 11.

5 15. Notable in its absence is any request that the Texas district court enforce a pre-
6 bankruptcy order which Debtor is allegedly violating. This case is not about protecting the
7 power of the district court to enforce its own orders; instead, Bunnett is seeking to advance its
8 own interests by forcing the debtor to continue in discovery in a lawsuit directly seeking
9 damages from the Debtor.

10 16. This point is vital, as it demonstrates that the request for such relief lies squarely
11 outside the narrow judicially-crafted exception to the Automatic Stay recognized in the Ninth
12 Circuit to allow non-bankruptcy courts to enforce their pre-petition orders. In defining that
13 exception, the Bankruptcy Appellate Panel stated that “a contempt action for nonpayment of
14 court-ordered sanctions is exempted from the automatic stay unless the proceeding turns on the
15 determination or collection of the underlying judgment.” In re Dingley, 514 B.R. 591, 600
16 (B.A.P. 9th Cir. 2014). There is no way to align the requirements of this exception with the
17 demands stated in the Post-Filing Motion.

18 17. As there is no exception to the Automatic Stay which would allow the Post-
19 Filing Motion to be resolved in Bunnett’s favor, Debtor seeks enforcement of the stay as
20 discussed herein.

21 **The Post-Filing Motion of Plaintiffs Requests Monetary Sanctions, and Thereby Violates**
22 **the Automatic Stay**

23 18. The Post-Filing Motion does not stop with the relief discussed above. In
24 addition to the requests for an order compelling further discovery, Bunnett has specifically

1 requested that the court order “costs and fees incurred in the filing of this motion.” RJN,
2 Exhibit B (the Post-Filing Motion), p. 11.

3 19. Once again, no exception exists to allow Bunnett to pursue such relief. The
4 automatic stay prevents any act to obtain possession of property of the estate. 11 U.S.C. §
5 362(a)(3). In a Chapter 13, property of the estate includes property the debtor acquires after
6 commencement of the case, as well as post-petition earnings. 11 U.S.C. § 1306(a). By way of
7 the Post-Filing Motion, Bunnett is seeking to recover money from the Debtor in a non-
8 bankruptcy forum. All of Debtor’s assets, as well as Debtor’s post-petition earnings, are
9 currently protected by the automatic stay and Bunnett’s Post-Filing Motion is attempting to
10 obtain an award against those assets and earnings.

11 20. It is also important to note that the Bunnett Litigation appears to be an attempt
12 to keep Debtor completely out of the dairy industry. If Bunnett was successful in that attempt,
13 that would substantially decrease Debtor’s ability to earn income which could be used to fund
14 a plan in this case. At this point, Debtor is unsure if or when he would ever work in the dairy
15 industry, but he should not be foreclosed from doing so.

16 **Actions Taken in Violation of the Automatic Stay are Void, and Only This Court Has the**
17 **Authority to Terminate It**

18 21. As discussed herein, the Post-Filing Motion, and its requested relief, violates the
19 Automatic Stay. Actions taken in violation of the stay are void. In re Schwartz, 954 F.2d 569,
20 571 (9th Cir. 1992).

21 22. It is this court, not the district court in Texas, that has the sole authority to
22 modify or terminate the Automatic Stay. *See In re Gruntz*, 202 F.3d 1074, 1081 (9th Cir.
23 2000). Unless and until this court orders otherwise, the Automatic Stay operates to protect the
24 Debtor from just such relief as requested by the Post-Filing Motion.

1 **Bunnett Can Obtain All the Discovery It Needs In this Bankruptcy Case**

2 23. Debtor has attempted to convince Bunnett that Debtor has no trade secrets or
3 confidential information of Bunnett. To the extent that Bunnett still believes this is not the
4 case, this bankruptcy case actually provides many opportunities for Bunnett to obtain the
5 information it desires.

6 24. First, Debtor will be required to appear and answer questions under oath at a
7 341 meeting of creditors. If Bunnett's allegations were true and Debtor was using Bunnett
8 confidential information, Debtor would not be able to confirm a Chapter 13 Plan and that
9 information would be important to bring out at the 341 meeting of creditors. Consequently, the
10 341 meeting of creditors would be a prime opportunity to be able to cross-examine Debtor to
11 verify that he is not using any alleged trade secrets of Bunnett.

12 25. Second, F.R.B.P. 2004 provides a mechanism for any party in interest to obtain
13 a deposition of the Debtor. Bunnett could easily avail itself of this remedy.

14 26. Third, because Debtor has had to file bankruptcy, Debtor is required to disclose
15 his financial dealings in filings with the Court and to provide extensive financial information to
16 the Chapter 13 Trustee. If there was something in those disclosures that showed Debtor was
17 operating some business on the side using confidential information from Bunnett, that would
18 be plainly apparent and the Chapter 13 Trustee would not allow Debtor to continue in Chapter
19 13.

20 27. If Bunnett really just wants to verify that Debtor is not using confidential
21 information against Bunnett (instead of attempting to harass Debtor), Bunnett has ample means
22 within the bankruptcy case to do so.

By: /s/ Peter L. Fear
Peter L. Fear